No. 96-8516

NOV 12 1997

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KENNETH E. BOUSLEY,

Petitioner,

—v.—

JOSEPH M. BROOKS,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

Larry W. Yackle
(*Counsel of Record*)
Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-2826

Steven R. Shapiro
American Civil Liberties Union
Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

CORD PRESS, INC., 157 Chambers Street, N.Y. 10007—93343—(212) 619-4949

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INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. Because this case involves the continued imprisonment of someone based on an acknowledged misinterpretation of the law, it raises issues of fundamental importance to the ACLU and its members.

STATEMENT OF THE CASE

The petitioner, Kenneth E. Bousley, is a federal prisoner now in the custody of the Federal Bureau of Prisons. In 1990, he pled guilty to a charge of "using" a firearm "during and in relation to" a drug offense within the meaning of 18 U.S.C. §924(c). He is now serving a five-year term pursuant to §924(c).

At the time of Mr. Bousley's conviction, the lower courts understood that a defendant could be convicted for "using" a firearm under §924(c) if the defendant possessed a gun for protection during a drug transaction. Mr. Bousley admitted that he had stored firearms on the premises where he was arrested for drug offenses. He was led to believe that, on the basis of those facts, he was guilty of the §924(c) "using" offense. His appeal on other issues was unsuccess-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

ful. *United States v. Bousley*, 950 F.2d 727 (8th Cir. 1991).

In 1994, Mr. Bousley filed a *pro se* habeas corpus petition attacking his plea to the §924(c) "using" charge on the ground that the plea was not supported by an adequate factual record. The district court treated that petition as Mr. Bousley's initial motion to vacate sentence pursuant to 28 U.S.C. §2255, and denied relief. While Mr. Bousley's appeal from that judgment was pending, this Court held in *Bailey v. United States*, 516 U.S. __, 116 S.Ct. 501 (1995), that a defendant "uses" a firearm within the meaning of §924(c) only if he actively employs a gun to perpetrate a drug crime. The circuit court appointed counsel to brief the effect of *Bailey*, but ultimately held that Mr. Bousley had waived any claim based on the new and authoritative interpretation of §924(c) by pleading guilty and failing to challenge the factual basis of his plea on direct review -- five years before *Bailey* was decided. This Court granted *certiorari*.

SUMMARY OF ARGUMENT

Something important is at stake in this case. On the surface, the question is whether a federal prisoner may have access to the federal courts to attack a criminal judgment collaterally. More fundamentally, the question is whether the federal government can continue to imprison a man after it has been established that the statute under which he was convicted and sentenced does not reach the behavior in which he engaged. Under the most basic principles of due process, the government must justify depriving any person of liberty. In this instance, the government has no legitimate penal justification for imposing a criminal penalty on a man for a crime he did not commit.

The government may fairly ascribe Mr. Bousley's original sentence to an honest (though seriously mistaken) construction of §924(c). Now, however, in light of this Court's authoritative construction of that statute in *Bailey*, it is clear on the face of the extant record that Mr. Bousley is *legally innocent* of the offense of which he was convicted and is thus serving a sentence for which he is *legally ineligible*.

The *Bailey* decision overruled an interpretation of §924(c) that had been accepted by every circuit court at the time of Mr. Bousley's guilty plea and that he reasonably regarded as controlling. The applicability of *Bailey* in this §2255 action therefore turns on the nature and function of the §2255 motion remedy. The primary function of that remedy is to authorize the same federal judge who handled earlier phases of a federal prisoner's case to cure precisely this kind of error, in reliance on the files and records already available.

This Court held in *Davis v. United States*, 417 U.S. 333 (1974), that a district court entertaining a §2255 motion from a federal prisoner must give effect to a new interpretation of federal criminal law if it reveals that the prisoner is legally innocent. In light of this Court's decision in *Bailey*, Mr. Bousley was convicted and sentenced for behavior that §924(c) does not count as "using" a firearm. The sentencing court's erroneous construction of §924(c) produced the unauthorized sentence that Mr. Bousley is now serving. Accordingly, that sentence is subject to attack in this §2255 proceeding.

The point of *Davis* is equally the point of this Court's recent decisions regarding the availability of federal collateral relief. The government is entitled to imprison offenders whose behavior Congress, in its wisdom, has made a federal crime. But the government has no legitimate interest in confining a man whose conduct Congress has not condemned. Even assuming that the government may have an interest in defending a prison sentence in a case in which a

collateral challenge would require an evidentiary hearing, the government has no legitimate interest in preserving a sentence that is plainly unlawful in light of the record already in place.

Nothing this Court failed to decide in *Davis* undercuts the force of that precedent in this case. Nor does this Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989), have implications here. The doctrine in *Teague* deals with the availability of new rules of *constitutional criminal procedure* (not new interpretations of federal substantive criminal law) in §2254 habeas corpus proceedings (not §2255 proceedings) involving *state* (not federal) prisoners. *Teague* adjusts federal/state relations and protects the finality of state criminal judgments. In this §2255 case, by contrast, a district court is charged with implementing the federal criminal law policies that Congress has selected.

Mr. Bousley's plea of guilty does not foreclose his claim. Because he was mistakenly led to believe that he could be convicted even though he had not actively employed a firearm, he was in no position to admit his guilt under §924(c), properly construed.

ARGUMENT

I. A DISTRICT COURT ENTERTAINING A FEDERAL PRISONER'S §2255 MOTION TO VACATE A SENTENCE IMPOSED UNDER 18 U.S.C. §924(c) MUST GIVE §924(c) THE CONSTRUCTION THIS COURT GAVE THAT STATUTE IN *BAILEY*

This case requires the Court to visit, for the first time in many years, the institutional framework Congress has established for ensuring that *federal* criminal offenders serve only the sentences that Congress has prescribed in federal *substantive* criminal statutes.

This Court's decision in *Bailey* rejected the construction the lower courts had previously placed on §924(c) and, in so doing, effectively overruled every lower court precedent on point.[2] The *Bailey* decision, accordingly, gave rise to the question here: whether a district court entertaining a §2255 motion by a prisoner who was convicted and sentenced prior to *Bailey* can ignore *Bailey*'s authoritative construction of §924(c), resuscitate the erroneous construction the court employed previously, and dispose of the prisoner's claim on that basis. Mr. Bousley's petition for *certiorari* refers to this question as whether *Bailey* is "retroactively" applicable to this case. *See* Petition for *Certiorari* at i.

This Court has already remanded a number of cases in light of *Bailey*.[3] The prisoners in those cases had all been convicted and sentenced before *Bailey* was decided, but nonetheless sought appellate relief on the basis of *Bailey*'s construction of §924(c). If Mr. Bousley's case is different, it can only be because he advances his claim in a §2255 motion. In this context, however, that distinction is not meaningful, and the precedent established in *Bailey* is fully applicable. The record in this case establishes that Mr. Bousley is legally innocent and is thus entitled to the relief he seeks. The lower courts have held as much in similar

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[2] The Solicitor General's brief in *Bailey v. United States* accurately informed the Court that the circuits had "uniformly" construed §924(c) to reach mere possession of a firearm for the "protection" of drug transactions. Brief for the United States, at 32 & n.12 (citing illustrative lower court decisions).

[3] *E.g.*, *Fuentes v. United States*, 516 U.S. __, 116 S.Ct. 663 (1995). *See Thomas v. American Home Products*, __ U.S. __, __, 117 S.Ct. 282, 283 (1996)(Scalia, J., concurring).

cases, and this Court should reach the same conclusion.[4]

A. The §2255 Motion Remedy

As Justice Harlan explained, collateral review cases present a choice of law question that direct review cases do not. The answer to that choice of law question in any given case turns on the "nature, function, and scope of the adjudicatory process" in which the case arises.[5] In this instance, the adjudicatory device on which Mr. Bousley and similarly situated litigants rely is a motion to vacate sentence pursuant to 28 U.S.C. §2255. The enforceability of the *Bailey* decision in a §2255 proceeding is, accordingly, a function of the nature and purpose of that motion remedy.

At a minimum, §2255 provides prisoners attacking federal convictions and sentences with a modern remedy (in the sentencing court) that is "exactly commensurate" with the remedy that habeas corpus had previously supplied (in a court near the prisoner's place of confinement).[6] Yet, that is hardly all that §2255 contributes to the federal criminal justice system. In addition to substituting for habeas corpus, §2255 also restates, clarifies, and simplifies "the procedure

[4] *E.g.*, *Stanback v. United States*, 113 F.3d 651 (7th Cir. 1997); *United States v. Barnhardt*, 93 F.3d 706 (10th Cir. 1996); *United States v. Garcia*, 77 F.3d 274 (9th Cir. 1996); *United States v. Thompson*, 122 F.3d 304 (5th Cir. 1997). Indeed, the Eighth Circuit below did not refuse to apply *Bailey* because Mr. Bousley advanced his claim via a §2255 action, but rather for the "distinct" reason that, in the circuit court's view, Mr. Bousley had committed procedural default by failing to anticipate *Bailey* at trial or on direct review. *Bousley v. Brooks*, 97 F.3d 284, 287 n.2 (8th Cir. 1996).

[5] *Mackey v. United States*, 401 U.S. 667, 682 (1971)(Harlan, J., concurring & dissenting).

[6] *Hill v. United States*, 368 U.S. 424, 427 (1962).

in the nature of the ancient writ of error coram nobis."[7] A §2255 motion thus constitutes "a further step in the movant's criminal case"[8] at which the district court is empowered to explore and determine whether a movant's sentence was imposed "without jurisdiction" or took a form "not authorized by law." If the court reaches a judgment favorable to the prisoner, it is obliged not only to "set aside the judgment and to discharge the prisoner" if that form of relief is warranted, but also to "resentence" the prisoner or to "correct" his sentence where appropriate.[9]

The §2255 motion remedy differs in important respects from the habeas corpus remedy, codified in 28 U.S.C. §2254, for state prisoners challenging custody at the hands of state authorities. In a habeas corpus action under §2254, a federal district judge comes fresh to a state prisoner's case, develops the material facts according to statute and this Court's precedents, and then reexamines (in the special manner of habeas corpus) the judicial actions previously taken by state courts. Habeas corpus thus has implications for federal/state relations and can contribute to tensions between the two systems. In a §2255 action, by contrast, the same district court judge who handled the earlier phases of a federal convict's case considers and corrects his or her own errors -- typically on the basis of the "files and records of the case" already before the court. 28 U.S.C. §2255.

In enacting §2255, accordingly, Congress has not merely located a habeas remedy in a more convenient forum.

[7] 28 U.S.C. §2255 (revision note); *accord United States v. Morgan*, 346 U.S. 502, 505-06 n.4 (1954)(stating that coram nobis and §2255 are of the "same general character").

[8] Advisory Committee Note to §2255 Rule 1, quoting S. Rep. No. 1526, 80th Cong., 2d Sess. 2 (1948).

[9] *Id.*, quoting 28 U.S.C. §2255.

Congress has extended federal criminal cases to a post-judgment proceeding at which special attention is paid to the validity of the sentences imposed on federal offenders. The choice of law question in this case must be resolved with these singular features of the §2255 remedy in view.

B. The Decision In *Davis v. United States*

This Court held in *Davis v. United States*, 417 U.S. 333, that a district court entertaining a §2255 motion by a federal prisoner must give effect to an "intervening change in substantive law" when that change reveals that the prisoner is *legally innocent* of the offense of which he was convicted and thus is *legally ineligible* for the sentence he has been ordered to serve.

The Court explained in *Davis* that the §2255 motion remedy is available to cure "fundamental" defects in federal criminal sentences -- defects which, if uncorrected, result in "a complete miscarriage of justice." 417 U.S. at 346. A miscarriage of justice occurs, in turn, when a new interpretation of the statute under which a defendant was convicted reveals that he was convicted "for an act that the law does not make criminal." *Id.* at 346-47.[10] This only makes sense. In such a case, it was the very misunderstanding of the governing statute which actually produced the prisoner's invalid sentence in the first place.

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[10] The Court embraced the "fundamental defect" formulation as a general threshold for the constitutional and nonconstitutional claims that are cognizable in a §2255 proceeding, irrespective of whether a novel proposition of federal substantive law is invoked to expose such a defect. The Court was perfectly clear, however, that when a change in federal substantive criminal law discloses a "fundamental defect" a district court entertaining a §2255 motion must give effect to it. 417 U.S. at 334 (explaining that the *Davis* case involved "the availability of collateral relief from a federal criminal conviction based upon an intervening change in substantive law").

The focus in *Davis* on legal innocence comports with more recently developed doctrines governing the availability of federal collateral relief. This Court has reminded litigants and lower courts alike that the point of criminal justice is to distinguish the guilty from the innocent and that collateral review must reflect that premise.[11] Indeed, when a prisoner shows that he has been given a sentence for which he is *legally ineligible*, the Court has held that even a *successive* petition may be employed to ensure that such a sentence is corrected.[12]

These principles control this case. Mr. Bousley alleges that he did not actively employ a firearm in connection with a drug offense. That claim is plainly sustained by the record. Inasmuch as *Bailey* has now authoritatively held that active employment of a gun is an essential element of the §924(c) "using" offense, Mr. Bousley is legally innocent of that offense. If the sentencing court's misconstruction of §924(c) were not responsible for Mr. Bousley's current detention, this might be a different case. Yet precisely *that error* in *this* case renders the sentence Mr. Bousley is now serving open to attack in a §2255 action.[13]

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[11] *E.g.*, *O'Neal v. McAninch*, 513 U.S. __, __, 115 S.Ct. 992, 997 (1995)(explaining that the "basic purposes" of the writ of habeas corpus include reducing the risks that the outcome of trials will be unreliable and that "innocent" citizens will be condemned by mistake); *Murray v. Carrier*, 477 U.S. 478, 496 (1986)(explaining that ordinary rules governing procedural default must give way when it appears that one who is "probably" innocent has nonetheless been convicted).

[12] *Sawyer v. Whitley*, 505 U.S. 333 (1992).

[13] On the basis of the same principles, the lower courts have applied this Court's decisions in *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Maze*, 414 U.S. 395 (1974); *McNally v. United States*, 483 U.S. 350 (1987); and *Ratzlaf v. United States*, 510 U.S. 135 (1994), in §2255 actions involving convictions and sentences already final at the

(continued...)

It is hardly surprising that a district court must give effect to an interim change in federal substantive law that reveals a prisoner's legal innocence. Such claims approximate the claims this Court began to entertain in federal habeas corpus cases in the latter part of the nineteenth century. At that time, the Court typically stated that habeas was limited to testing criminal convictions for "jurisdictional" error. But, as Justice Harlan explained, the Court gradually forged an "expansion of the definition of jurisdiction" in cases in which prisoners were convicted under invalid statutes or sentenced to serve a prison term that "the governing statute" did not permit.[14] Professor Bator, too, found it significant that the Court relaxed the limits on habeas corpus in these and similar circumstances -- well in advance of modern developments.[15]

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[13] (...continued)
time those decisions were handed down. *E.g.*, *United States v. Fargnoli*, 458 F.2d 1237 (1st Cir. 1972)(*Welsh*); *Strauss v. United States*, 516 F.2d 980 (7th Cir. 1975)(*Maze*); *Ingber v. Enzor*, 841 F.2d 450 (2d Cir. 1988)(*McNally*); *United States v. Brown*, 117 F.3d 471 (11th Cir. 1997)(*Ratzlaf*).

[14] *Fay v. Noia*, 372 U.S. 391, 451 (1963)(Harlan, J., dissenting), citing *Ex parte Siebold*, 100 U.S. 371 (1879), and *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873).

[15] Paul M. Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv.L.Rev. 441, 466-74 (1963). Neither Justice Harlan nor Professor Bator proposed that the nineteenth century precedents paint a perfectly coherent and consistent picture of the writ's availability in that period. Nor did they explicitly anticipate the question presented in this case and state that the Court in the *Siebold* and *Lange* period would have found Mr. Bousley's claim cognizable. Yet Justice Harlan and Professor Bator did identify a number of precedents indicating that this is the kind of claim that the Court's emerging analysis would have found appealing. Professor Bator explained, for example, that in *Siebold* the Court assumed that "the acts charged in the indict-
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C. What *Davis* Failed To Decide

Nothing this Court *failed* to decide in *Davis* undermines what the Court plainly *did* decide. A selective service board had declared Davis delinquent. Thereafter, the board accelerated his induction into the Armed Services. When he did not report, he was prosecuted. While his appeal was pending, this Court decided in *Gutknecht v. United States*, 396 U.S. 295 (1970), that it was unlawful for a selective service board to accelerate a registrant's induction as a penalty for delinquency. The circuit panel handling Davis' appeal remanded the case to the district court for reconsideration in light of *Gutknecht*.

The district court held a hearing, concluded that Davis' induction had not in fact been accelerated because of his delinquent status, and reaffirmed his conviction. Davis appealed that judgment and, when the court of appeals affirmed the district court, he sought *certiorari* in this Court. While that petition was pending, another panel in the same circuit held in a separate case, *United States v. Fox*, 454 F.2d 593 (9th Cir. 1971), that, in light of *Gutknecht*, a registrant ordered to report for induction as a delinquent was subject to accelerated induction as a matter of law, irrespective of any evidence that the board had not actually expedited his induction on that basis. Accordingly, the panel in *Fox* concluded that the registrant in that case, like the regis-

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[15] (...continued)
ment were in fact forbidden by the statute" and, on that basis, reached the further question whether the statute was constitutional. Bator, *supra* at 468 n.61. In Bator's view, the "wisdom" of handling the case in that way was questionable, thus intimating that the Court may actually have been feeling its way toward a wider purview for habeas corpus that would avoid unnecessary constitutional questions by focusing on ostensibly nonconstitutional questions of statutory construction. *Id.*

trant in *Gutknecht*, could not be prosecuted.[16]

After this Court denied *certiorari*, Davis filed a §2255 motion in which he contended that *Fox* constituted a change in the relevant substantive law, which (if applied to his case) revealed that he had been erroneously prosecuted, convicted, and sentenced. This Court ultimately granted review of the case in that posture in order to overturn the circuit's dismissal on the basis of the "law of the case" doctrine. Since the circuit court below had not passed on the merits of Davis' claim, this Court had no occasion itself to address that claim and thus no occasion to consider whether *Fox* was correct in deciding that delinquent registrants suffered accelerated induction as a matter of law.[17] For the same reason, this Court had no occasion to decide whether *Gutknecht* had "retroactive application."[18]

Neither of those reservations affects the force of the Court's decision in *Davis* -- namely, that a district court entertaining a §2255 motion must address a prisoner's claim that a new interpretation of the statute he was convicted of

[16] According to the panel in *Fox*, the board could decide whether to accelerate a registrant's induction only if the registrant was first declared delinquent. Any discretionary decision actually to call a registrant early was traceable to the registrant's delinquency status and thus constituted an unauthorized penalty for delinquency.

[17] *Davis*, 417 U.S. at 341 n.12.

[18] *Id.* In 1974 when *Davis* was decided, this Court had not yet announced that its decisions, however novel, are always applicable to criminal cases still in the appellate pipeline. That is why it was intelligible then (though it would not be today) to treat the applicability of *Gutknecht* in *Davis* as a theoretically open question. While Davis had originally been convicted and sentenced prior to *Gutknecht*, his appeal was pending at the time of this Court's decision in that case.

violating reveals that he is legally innocent.[19] Having disclaimed a forthright decision on whether *Fox* had correctly construed the statute (and *Gutknecht*), the Court assumed for purposes of its decision that *Fox* had understood the statute (and *Gutknecht*) accurately and that Davis' claim based on *Fox* was valid:

> [Davis'] contention is that the decision in *Gutknecht* . . . as interpreted . . . in *Fox* . . . establishes that his induction order was invalid . . . and that he could not be lawfully convicted for failure to comply with that order. *If this contention is well taken*, then Davis' conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances" that justify collateral relief under §2255. Therefore, *although we express no view on the merits of the petitioner's claim, we hold that the issue he raises is cognizable in a 2255 proceeding.*

417 U.S. at 346-47 (emphasis added).

[19] The holding in *Davis* on the basis of the facts in that case renders a similar result here irresistible. In *Davis*, the change in the law the Court assumed to have occurred came about by means of a more recent decision by a different panel of the same circuit court. That panel decision was not formally authoritative (as against the previous panel's decision) in the way that an *en banc* decision would have been or, of course, in the way that a decision from this Court necessarily must be. Here, then, Mr. Bousley seeks to enforce a far more authoritative new principle of federal criminal law than the one the Court had "no doubt" the prisoner in *Davis* could advance.

D. The Relevance Of *Teague*

Nor do this Court's recent cases beginning with *Teague v. Lane*, 489 U.S. 288, undercut either the authority of *Davis* or its persuasive analysis of the issue here. The *Teague* doctrine addresses the quite different problems attending the enforcement of federal constitutional *procedural* requirements in *state* criminal cases by means of federal habeas corpus pursuant to 28 U.S.C. §2254. In that context, the Court held in *Teague* that novel rules of *constitutional procedure* are enforceable in federal habeas proceedings only in exceptional instances. *Teague* is not on point here -- for three related reasons.

First, *Teague's* general policy regarding the application of new procedural safeguards is expressly focused on cases in which state §2254 petitioners seek habeas corpus relief. The lower courts have concluded that *Davis* rather than *Teague* governs cases (like this one) in which federal §2255 petitioners advance new rules of substantive criminal law.[20]

Second, within the §2254 context in which it resides, the *Teague* doctrine prescribes the consequences of new rules of criminal *procedure*, not new understandings of the *substance* of criminal offenses.[21] *Teague* thus affects the guilt-determination function in criminal cases only indirectly. By contrast, a new construction of a criminal statute specifies the behavior the statute morally condemns and thus makes it possible to talk intelligibly about who is guilty and who is innocent. A prisoner who was convicted and sentenced without benefit of a procedural rule that would have enhanced the chances of finding the facts accurately *may* be innocent. A prisoner who was convicted and sentenced for conduct that a new interpretation of the substantive statute shows not to be covered *is* innocent. His behavior has not been denounced as criminal. This is Mr. Bousley's claim in this case. No state prisoner in any of the *Teague* cases made, or could have made, the same claim or anything like it.

The focus on procedure in *Teague* is hardly surprising. Prisoners challenging state convictions are not in a position to *have* claims arising from substantive federal criminal law, but almost always contend that state statutes have been enforced in a way that violates federal procedural standards. In §2255 cases, by contrast, substantive claims regarding the meaning of federal statutes can easily arise. This accounts for the existence of *Davis*, itself a §2255 case, which has long guided the lower courts in determining the effect of changes in federal substantive law.[22]

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[20] *See* cases cited in note 4 *supra*. *Cf. Ianniello v. United States*, 10 F.3d 59, 63 (2d Cir. 1993)(Lumbard, J.)(noting that "the *Teague* line of cases does not purport to affect the holding in *Davis*").

[21] *See Ingber v. Enzor*, 841 F.2d at 454 n.1 (drawing this distinction); *accord United States v. Woods*, 986 F.2d 669, 676-77 (3d Cir. 1993) (Becker, C.J.); *Chambers v. United States*, 22 F.3d 939, 943 (9th Cir. 1994)(Kaufman, J.), *vacated*, 47 F.3d 1015 (9th Cir. 1995). *Cf. Robinson v. Neil*, 409 U.S. 505, 508-09 (1973)(recognizing that "[guarantees] that do not relate to [the procedures for conducting trials] cannot be conveniently lumped together" with procedural rules for "retroactivity" purposes).

[22] Even so, the new rule of substantive law announced in *Bailey* approaches the kinds of new rules that *Teague* would allow a state prisoner to advance in a §2254 action. The Court made it clear in *Teague* that even a new procedural rule is available in habeas if, in its absence, "the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313. That concern for protecting innocent citizens plainly resonates with the claim that Mr. Bousley seeks to advance here. Moreover, *Teague* also recognized that some new rules going to substance are also available in habeas corpus, notwithstanding *Teague's* general policy that new procedural rules are usually unenforceable. Specifically, *Teague* explained that a novel rule is applicable in habeas proceedings if it "places certain kinds of primary, private individual conduct beyond the

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Third, inasmuch as *Teague* focuses on habeas corpus petitions by *state* prisoners, that doctrine does not attend to the relative roles of the executive and judicial branches of the federal government, on the one hand, and the legislative branch, on the other. *Teague's* primary purpose is to mitigate friction between the federal courts and the courts of the states.[23] Denying the applicability of a new procedural rule in a federal habeas proceeding involving a state prisoner thus touches federalism, but has nothing to do with the separation of powers. By contrast, denying the application of an innovative construction of a federal criminal statute in a §2255 proceeding initiated by a federal prisoner has everything to do with the separate spheres occupied by the three branches of the national government.

Congress alone is empowered to fashion substantive criminal law. If prosecutors and courts misconstrue a criminal statute to impose a penalty on behavior that is beyond its reach, they compromise the fundamental allocation of

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[22] (...continued)
power of the criminal law-making authority to proscribe." *Id.* at 307, quoting *Mackey v. United States*, 401 U.S. at 692 (Harlan, J., concurring & dissenting). In *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), the Court added that a prisoner can also rest on a new rule if it prohibits "a certain category of punishment for a class of defendants because of their status or offense." Since the Court was not focused on federal prisoners who might assert claims arising from shifts in the meaning of federal statutes, the *Teague* and *Penry* descriptions of the kind of new substantive rule that is available in §2254 habeas proceedings did not map perfectly on the cases that *Davis* had previously addressed. Yet the basic idea is the same. A prisoner can enforce a new rule if it demonstrates that his conduct did not fall within the ambit of the substantive criminal statute under which he was convicted and sentenced. *Cf. Gilmore v. Taylor*, 508 U.S. 333, 345 (1993)(holding that a new rule did not fit the *Teague* exception because it did not "'decriminalize' any class of conduct").

[23] *Stringer v. Black*, 503 U.S. 222, 227-28 (1992).

criminal law policy-making to the legislative branch. This Court exercises judicial judgment both with respect to the constitutional procedures by which criminal cases are conducted and with respect to the substantive criminal law being enforced. In the former instance, however, the Court has primary responsibility for elaborating the basic law. In the latter the Court's function is to effectuate the moral judgment made by Congress when the criminal statute was originally enacted. A decision that identifies the substantive prerequisites for criminal punishment under a statute, however "new" it may be as a practical reality, is nonetheless a vindication of a preexisting legislative policy.

II. A FEDERAL PRISONER'S PLEA OF GUILTY DOES NOT FORECLOSE A §2255 MOTION TO VACATE AN ERRONEOUS §924(c) SENTENCE IF THE PRISONER WAS LED TO BELIEVE THAT HE COULD BE CONVICTED AND SENTENCED UNDER §924(c) WITHOUT PROOF THAT HE ACTIVELY EMPLOYED A FIREARM

There is no justification for limiting *Bailey* claims to prisoners whose lawyers argued, in advance of *Bailey*, that "use" of a firearm meant its active employment. Precluding *Bailey* claims on a default theory would be indefensible in principle and utterly capricious in practical effect. It would honor §924(c) only in the breach. It would hypothesize a class of deserving prisoners that simply does not exist. And it would consign Mr. Bousley to serve a five-year sentence even though he clearly can show, *on the basis of the extant record in this case*, that he is legally innocent.

The very point of holding *Bailey* to be applicable to cases that were processed previously is to vindicate Congress' policy judgment regarding who is to be punished

under §924(c). It hardly would make sense, then, to make *Bailey* enforceable only hypothetically. Yet that is precisely what limiting *Bailey* to prisoners whose lawyers anticipated this Court's decision would accomplish. None of the prisoners in any of the reported *Bailey* cases claims to have pressed the "active employment" construction of §924(c) prior to *Bailey*. The class of litigants who did that is almost certainly a null set.

Even if a few such prisoners exist (and we cannot, of course, prove that they do not), they can only be those whose lawyers not only anticipated *Bailey*, but also advised their clients not to plead guilty in the face of monolithic circuit precedent to the contrary, to demand a trial at which the jury would be instructed to convict them for conduct they could not well deny, to object to that instruction, and then to attempt to make new law on appeal. Diligence is a virtue. But it hardly makes sense to celebrate futile litigation by creating incentives to turn routine criminal cases into vehicles for law reform.

A. The Waiver Fallacy

This is not a *waiver* case. No one proposes that Mr. Bousley was informed and understood that he could be convicted and sentenced under §924(c) only if he actively employed a firearm. No one proposes that he nonetheless deliberately withheld an objection to suffering conviction on the basis of the behavior reflected in the record. If Mr. Bousley's claim is not cognizable in a §2255 proceeding, it cannot be because he made an intelligent choice to forego an objection he knew or should have known was open to him, but rather because the government's interest in preserving his conviction and sentence is so powerful that Mr. Bousley must *forfeit* a claim he most certainly did not *waive*.

Yet the government has no legitimate interest in the incarceration of a citizen who did not engage in the behavior that Congress has condemned and, in this instance, no legitimate administrative interest in minimizing collateral litigation into the factual circumstances of individual cases. Mr. Bousley's *legal* innocence claim rests entirely upon the *extant record*. No fact-finding outside that record is needed to sustain it.

B. The Effect Of A Guilty Plea

Mr. Bousley's plea of guilty no more constituted a waiver of the claim Mr. Bousley seeks to vindicate in this §2255 action than did his failure to object to the trial court's construction of §924(c). *Tollett v. Henderson*, 411 U.S. 258, 266 (1973)(disclaiming the notion that a defendant who pleads guilty waives rights apart from the procedural rights associated with a trial); *accord Menna v. New York*, 423 U.S. 61, 62 n.2 (1975)(explaining that "waiver [is] not the basic ingredient of this line of cases").

Mr. Bousley's plea was plainly involuntary and unintelligent inasmuch as he was misled regarding *the* crucial element of the §924(c) "using" offense. *Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976). *See McCarthy v. United States*, 394 U.S. 459, 466 (1969)(explaining that a plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts").[24]

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[24] Not every guilty plea entered in a mistaken estimate of background law is, for that reason, invalid. This Court held in *Brady v. United States*, 397 U.S. 742 (1970), that a plea was not open to collateral attack simply because the defendant erroneously believed that, if he went to trial, the jury would be empowered to recommend a death sentence. In that case, however, the defendant had been fully and accurately informed of the elements of the charge against him, and it was on that premise

(continued...)

In both *Menna v. New York*, 423 U.S. 61, and *Blackledge v. Perry*, 417 U.S. 21 (1974), this Court held that defendants who plead guilty do not forego the right to attack their pleas on grounds that go to the government's ability to bring them into court to answer a criminal indictment in the first instance. That principle is plainly applicable here. Mr. Bousley contends that the behavior described in the record clearly does not support his prosecution for "using" a firearm within the meaning of §924(c). Accordingly, his claim goes not to the procedural *manner* in which the government proceeded against him, but rather to the very authority of the government to proceed against him at all.

Ordinarily, a criminal defendant who pleads guilty admits not only the particular conduct reflected in the record, but also his guilt of the offense to which the plea is entered. *United States v. Broce*, 488 U.S. 563, 570 (1989). Yet that general understanding of a guilty plea's implications presup-

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[24] (...continued)
that the Court concluded that his miscalculation regarding the jury's power to impose a death penalty on conviction did not "impugn the truth or reliability of his plea." *Id.* at 757. Thus, the defendant in *Brady* voluntarily admitted that he had engaged in the conduct that the statute in that case condemned as criminal based on an accurate understanding of what that conduct was. *See United States v. Brown*, 117 F.3d at 478. In this case, by contrast, Mr. Bousley was not informed that he could be convicted of "using" a firearm only if he actively employed a gun and thus did not, and could not, voluntarily admit his guilt. He made no faulty risk assessment, but pled guilty rather than force a trial that could lead to only one result. Other lower courts have found *Brady* plainly distinguishable and thus have rejected any suggestion that a plea of guilty forecloses a federal prisoner's *Bailey* claim. *E.g., Lee v. United States*, 113 F.3d 73, 75 (7th Cir. 1997)(explaining that a defendant who pleads guilty waives a future challenge to the existence of facts but not the right to contest whether those facts make out a crime); *United States v. Thompson*, 122 F.3d at 307 (holding that a plea of guilty to "using" was open to attack in a §2255 action where, in light of *Bailey*, there was no sufficient factual basis to sustain the conviction).

poses that the defendant is informed of the elements of the offense, so that he is in a position to know that his conduct meets the statute's requirements. It is because a plea ordinarily admits guilt that it is so essential that the defendant be properly informed. Otherwise, the admission of guilt has no basis and thus can offer no support for the conviction and sentence that rest upon it. *Id.* at 570. For that reason, Rule 11(c)(1) of the Federal Rules of Criminal Procedure directs a district court to "address the defendant personally" in open court and to "inform" the defendant of "the nature of the charge to which the plea is offered." *Broce*, 488 U.S. at 570.

This Court has recognized that collateral challenges to pleas of guilty are problematic when they require the reviewing court to investigate matters outside the record. *Id.* at 575. In this instance, however, Mr. Bousley's claim rests entirely on the *extant record* made at his plea colloquy. None of the practical difficulties the Court has noted in other cases obtains, and the government has no serious argument that an adjudication of Mr. Bousley's claim would demand significant litigation effort. It would not. By the government's own admission, the record discloses that Mr. Bousley had "'such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt.'" Brief for the United States, at 9, quoting *Tollett v. Henderson*, 411 U.S. at 644.

The basic principle is clear. The government can explain to a defendant that the behavior in which he engaged will result in a conviction if he goes to trial, and can reap the benefits of the defendant's willingness to accept the inevitable and spare everyone concerned the time and trouble a trial would entail. But the government cannot misinform a defendant that he can be convicted and sentenced on the basis of behavior that the relevant criminal statute does not cover, obtain a guilty plea on that basis, and *still* insist that

the plea justifies the defendant's imprisonment for a crime he did not commit.[25]

C. Conventional Default Doctrine

The circuit court below also treated this case as one in which Mr. Bousley had committed procedural default at the trial stage and must now demonstrate the "cause" and "prejudice" conventionally required to make a claim cognizable in a §2255 action despite default. *See United States v. Frady*, 456 U.S. 152 (1982). It is not at all clear that default doctrine governing cases that went to trial is apposite in this guilty plea case. But, to the extent the doctrine has any bearing here, it leads ineluctably to the same result: Mr. Bousley's claim is not foreclosed.

By all accounts, *Bailey's* interpretation of §924(c) was not reasonably available to Mr. Bousley. He thus had "cause" for failing to advance, at that time, the claim he presses now via §2255. No circuit court in the country had construed §924(c) in the way this Court ultimately did.[26] Faced with this unanimous precedent, Mr. Bousley lacked the tools with which to forge his current claim and thus had "cause" for failing to do so. *Reed v. Ross*, 468 U.S. 1 (1984); *cf. Engle v. Isaac*, 456 U.S. 107 (1982)(concluding that a prisoner had the necessary tools and *for that reason* had not shown "cause").[27]

Equally, Mr. Bousley has demonstrated "prejudice." After all, his understandable inability to anticipate *Bailey's* authoritative construction of §924(c) prevented him from avoiding conviction and sentencing on a record that did not reflect the necessary active employment of a firearm. *United States v. Frady*, 456 U.S. at 174 (explaining that "prejudice" is established if it appears that the error that went uncorrected raises a "substantial likelihood" that the result would otherwise have been different); *Reed v. Ross*, 468 U.S. at 12. (accepting that a petitioner had demonstrated "prejudice" because he "might not have been convicted" if he had been able to anticipate a later change in the law).

Moreover, this is quintessentially "an extraordinary case" in which a mistake "probably resulted in the conviction" of an innocent person. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Accordingly, Mr. Bousley would be entitled to advance his *Bailey* claim even if he had no sufficient "cause" for failing to present it previously. The circuit court

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[25] The existence of a plea agreement hardly forecloses an attack on a conviction and sentence that has no basis in the criminal statute under which a defendant was charged. This Court has approved plea negotiation as a means of implementing the policies that Congress has prescribed in federal criminal statutes. The Court has *never* suggested that plea negotiation can simply *substitute* for the enforcement of those statutes. When federal prosecutors and defense counsel engage in plea bargaining, they do so against the background of the federal criminal statutes implicated in a case. This is why Rule 11(f) of the Federal Rules of Criminal Procedure provides that a district court should not enter a judgment on the basis of a guilty plea "without making such inquiry as shall satisfy it that there is a factual basis for the plea." That requirement ensures that federal criminal judgments are anchored in the actual behavior for which Congress has authorized a criminal sanction. In this case, of course, the prosecutors who pressed a §924(c) "using" charge against Mr. Bousley relied in good faith on the understanding of that statute embraced by every circuit court in the country. Nevertheless, the law that Congress made has not been vindicated, but frustrated, and a man who did not engage in the conduct that Congress has actually denounced is in prison.

[26] *See* note 2 *supra*.

[27] The circuit court below offered no explanation for its failure to find "cause" in light of *Engle* and *Reed*. Instead, the court simply relied on the prior decision in *United States v. McKinney*, 79 F.3d 105 (8th Cir. 1996), *vacated*, __ U.S. __, 117 S.Ct. 1816 (1997), where another panel had summarily disposed of a similar question (equally without citation of authority), with one judge dissenting.

below did not consider this further "probable innocence" feature of conventional default doctrine. On that ground alone, the government has suggested that the lower court's decision should be reversed.[28]

The same result would follow if this case were governed by the amendments to §2255 included in the Anti-Terrorism and Effective Death Penalty Act of 1996.[29] Those amendments make no change in this Court's doctrine (reflected in *Frady*, *Engle*, *Reed*, and *Murray*) governing initial §2255 actions in which the government contends that claims are foreclosed because of previous default at the trial level.[30]

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[28] Brief for the United States, at 7.

[29] Pub. L. No. 154-132, 110 Stat. 1214. The amendments to §2255 in the new Act are inapplicable to this case, because Mr. Bousley filed his motion prior to the effective date of the AEDPA, April 24, 1996. *Lindh v. Murphy*, __ U.S. __, 117 S.Ct. 2059 (1997).

[30] The new Act does address analogous cases in which state prisoners are said to have committed default with respect to fact-finding in state court and in which either state or federal prisoners are said to have omitted claims from previous §2254 or §2255 actions. In those instances, the Act explicitly excuses a prisoner's failure to present a claim earlier if the claim rests on a "new rule" that is retroactively applicable to cases on collateral review. *E.g.*, 28 U.S.C. §2254(e)(2)(A)(i)(default with respect to state court fact-finding); 28 U.S.C. §2244(b)(2)(A)(default with respect to a prior §2254 action); 28 U.S.C. §2255 (default with respect to a prior §2255 action). Thus, the new Act plainly recognizes that prisoners cannot anticipate novel propositions of law, that no forfeiture sanction can create a sensible incentive to do so, and that the system works best if prisoners are permitted to advance "new rule" claims later. Indeed, under these provisions in the new Act, the only question to be answered is whether a new rule is retroactively applicable. If so, a prisoner advancing a claim that depends on that new rule can proceed without meeting any further standard meant to discourage default (*i.e.*, without showing "cause," "prejudice," or "probable innocence").

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

Larry W. Yackle
(Counsel of Record)
Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-2826

Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Dated: November 12, 1997